(2)

No. 89-1674.

In the

Supreme Court of the United States.

OCTOBER TERM, 1989.

ROSE CAROTA,
PETITIONER,

v.

THE CELOTEX CORPORATION,
RESPONDENT.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

THOMAS P. O'REILLY,
JANET L. MALOOF,
Trial Counsel,

RICHARD L. NEUMEIER,
LEONARD F. ZANDROW, JR.,*
B. DEIDRE BRENNAN,
Appellate Counsel,

PARKER, COULTER, DALEY & WHITE,
One Beacon Street,
Boston, Massachusetts 02108.
(617) 723-4500

**Counsel of Record*

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Question Presented for Review.

Did the United States Court of Appeals for the First Circuit correctly decide in this diversity jurisdiction case that the admissibility of the evidence that the plaintiff had settled with certain defendants prior to the trial represented a matter of substantive Massachusetts law, rather than a matter controlled by Rule 408 of the Federal Rules of Evidence?

Table of Contents.

Question presented for review i

Statement of the case 1

Reasons why writ of certiorari should be denied 6

The First Circuit Court of Appeals correctly followed the established precedent of this Court in deciding this case 6

Conclusion 14

Table of Authorities Cited.

CASES.

Affiliated Capital Corp. v. City of Houston, 793 F.2d 706 (5th Cir. 1986) 13

Alexander v. Town & Country Estates, Inc., 535 F.2d 1081 (8th Cir. 1976) 11

Allen v. Zurich Ins. Co., 667 F.2d 1162 (4th Cir. 1982) 10

Aubin v. Fudala, 782 F.2d 287 (1st Cir. 1986) 13

B&B Investment Club v. Kleinert's, Inc., 479 F. Supp. 787 (E.D. Pa. 1979) 4n

Belton v. Fibreboard Corp., 724 F.2d 500 (5th Cir. 1984) 4n

Bituminous Const., Inc. v. Rucker Enterprises, Inc., 816 F.2d 965 (4th Cir. 1987) 4n

Boston Edison Co. v. Tritsch, 370 Mass. 260, 346 N.E.2d 901 (1976) 11, 12

Bradbury v. Phillips Petroleum Co., 815 F.2d 1356 (10th Cir. 1987) 4n

Branch v. Fidelity & Casualty Co. of New York, 783 F.2d 1289 (5th Cir. 1986) 5n

Breuer Electric Manufacturing Co. v. Toronado Systems of America, Inc., 687 F.2d 182 (7th Cir. 1982) 4n

Brocklesby v. United States, 767 F.2d 1288 (8th Cir. 1985) 4n

Carota v. Johns Manville Corp., 893 F.2d 448 (1st Cir. 1990) 2, 6, 7, 8, 9 et seq.

Cassino v. Reichhold Chemicals, Inc., 817 F.2d 1338 (9th Cir. 1987) 4n

Central Soya Co., Inc. v. Epstein Fisheries, Inc., 676 F.2d 939 (7th Cir. 1982) 4n

Crenshaw v. Quarles Drilling Corp., 798 F.2d 1345 (10th Cir. 1986) 11

Crues v. KFC Corp., 768 F.2d 230 (8th Cir. 1985) 4n

Daniels v. Celeste, 303 Mass. 148, 21 N.E.2d 1 (1939) 11

Davis v. Wakelee, 156 U.S. 680 (1895) 10

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) 7, 8, 10

Fasanaro v. Mooney Aircraft Corp., 687 F. Supp. 482 (N.D. Cal. 1988) 8n

Flaminio v. Honda Motor Co., 733 F.2d 463 (7th Cir. 1984) 8n

Franklin v. Guralnick, 394 Mass. 753, 477 N.E.2d 405 (1985) 11

Guaranty Trust Co. v. York, 326 U.S. 99 (1945) 8

Hanna v. Plumer, 380 U.S. 460 (1965) 7, 8, 9, 10

Hill v. Bache Halsey Stuart Shields, Inc., 790 F.2d 817 (10th Cir. 1986) 13

Holleman v. Gibbons, 27 Mass. App. Ct. 563, 541 N.E.2d 345 (1989) 11

In Re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106 (7th Cir. 1979), *cert. denied*, 444 U.S. 870 (1979) 4n

In Re Japanese Electronic Products Antitrust Litigation, 723 F.2d 238 (3d Cir. 1983) 4n

Jett v. Zink, 474 F.2d 149 (5th Cir. 1973) 11

John McShain, Inc. v. Cessna Aircraft Co., 563 F.2d 632 (3d Cir. 1977) 4n

Kennon v. Slipstreamer, Inc., 794 F.2d 1067 (5th Cir. 1986) 4n

Kotteakos v. United States, 328 U.S. 750, 66 S. Ct. 1239 (1946) 5n

Lataille v. Ponte, 754 F.2d 33 (1st Cir. 1985) 5n

Losey v. North American Philips Consumer Electronics Corp., 792 F.2d 58 (6th Cir. 1986) 13

McHann v. Firestone Tire & Rubber Co., 713 F.2d 161 (5th Cir. 1983) 12n

Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d 917 (10th Cir.), *cert. denied*, 469 U.S. 853 (1984) 8n

Muzichuk v. Liberty Mutual Ins. Co., 2 Mass. App. Ct. 266, 311 N.E.2d 558 (1974) 11

O'Gilvie v. International Playtex, Inc., 821 F.2d 1438 (10th Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988) 13

O'Neil v. National Oil Co., 231 Mass. 20, 120 N.E. 107 (1918) 11

Patriot Cinemas, Inc. v. General Cinema Corp., 834 F.2d 208 (1st Cir. 1987) 10

Pennsylvania v. Bruder, 109 S.Ct. 205 (1988) 7

Ricciardi v. Children's Hosp. Medical Center, 811 F.2d 18 (1st Cir. 1987) 10

Richardson v. Turner, 716 F.2d 1059 (4th Cir. 1983) 11

Rioux v. Daniel Intern. Corp., 582 F. Supp. 620 (D. Me. 1984) 8n

Ruhlin v. New York Life Ins. Co., 304 U.S. 202 (1938) 12n

Sharp v. Hall, 482 F. Supp. 1 (E.D. Okla. 1978) 4n

Smith v. Industrial Constructors, Inc., 783 F.2d 1249 (5th Cir. 1986) 13

Triangle Mining Co., Inc. v. Stauffer Chemical Co., 753 F.2d 734 (9th Cir. 1985) 5n

Tritsch v. Boston Edison Co., 363 Mass. 179, 293 N.E.2d 264 (1973) 3n, 11

United States v. City of Twin Falls, Idaho, 806 F.2d 862 (9th Cir. 1986), *cert. denied*, 482 U.S. 914 (1987) 13

United States v. Pisari, 636 F.2d 855 (1st Cir. 1981) 5n

Wadsworth v. Boston Gas Co., 352 Mass. 86, 223 N.E.2d 807 (1967) 11

Walker v. Armco Steel Corp., 446 U.S. 740 (1980) 8

Weir v. Federal Ins. Co., 811 F.2d 1387 (10th Cir. 1987) 4n

Willey v. Minnesota Mining & Manufacturing Co., 755 F.2d 315 (3d Cir. 1985) 13

Woodling v. Garrett Corp., 813 F.2d 543 (2d Cir. 1987) 13

STATUTORY PROVISIONS AND RULES.

28 U.S.C. § 2111 5n

Federal Rules of Civil Procedure

Rule 49 2

Federal Rules of Evidence

Rule 103(a) 5n
Rule 407 8n
Rule 408 3, 4, 6, 7 et seq.

Supreme Court Rules

Rule 17.1(a) 7
Rule 28.1 1n

OTHER AUTHORITIES.

1B *Moore's Federal Practice* ¶0.405[8] (1988 ed.) 11

1 J. Weinstein & M. Berger, *Weinstein's Evidence* § 103[06] (1982) 5n

23 C. Wright & K. Graham, *Federal Practice and Procedure: Evidence* § 5315 (1980) 9

Note, "Rule 408 and *Erie*: The Latent Conflict," 12 Ga. L. Rev. 275 (1977) 9

No. 89-1674.

In the
Supreme Court of the United States.

OCTOBER TERM, 1989.

ROSE CAROTA,
PETITIONER,

v.

THE CELOTEX CORPORATION,[1]
RESPONDENT.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Statement of the Case.

This case involves the issue of whether a single-sentence reference to the fact that the plaintiff settled certain claims

[1] For the limited purposes of Supreme Court Rule 28.1, The Celotex Corporation might be regarded as a wholly owned subsidiary of the Jim Walter Corporation.

with other defendants, which was presented to the jury in the form of a "stipulation," constituted reversible error requiring a new trial. As discussed *infra*, this evidence did *not* violate either the applicable state or federal law, and the First Circuit Court of Appeals did *not* apply an incorrect standard of review in analyzing the admissibility of this evidence.

The respondent The Celotex Corporation ("Celotex") submits that the propriety of the First Circuit Court of Appeals' analysis of the applicable law, as reported in this case in *Carota* v. *Johns Manville Corp.*, 893 F.2d 448 (1st Cir. 1990) and as also set forth in the appendix to the petitioner Rose Carota's ("petitioner") petition for writ of certiorari, stands on its own with little need for commentary or explanation from Celotex. Celotex submits this opposition, however, to address and clarify certain allegations contained in the petition, which may not be readily apparent or refuted by the text of the circuit court's opinion in this case. See *Carota* v. *Johns Manville Corp.*, *supra* at 448-451.

Celotex adopts the petitioner's statements regarding "jurisdiction" and "statutory provisions in issue." Celotex also adopts the petitioner's "statement of the case" with the following exceptions.

First, the petitioner did not object to this case being submitted to the jury on a general verdict basis only. See Petition for Writ of Certiorari, p. 4. Relatedly, the petitioner did not suggest that any specific interrogatories be submitted to the jury, pursuant to Fed. R. Civ. P. 49 or otherwise, to aid in the rendition of a verdict. Accordingly, any complaint by the petitioner that it is impossible to isolate what influence, if any, the pretrial settlement evidence had upon the jury in this case has not been preserved for appellate review. See Petition for Writ of Certiorari, pp. 4-5.

Second, and more importantly, the petitioner's premise that the admission of the pretrial settlement evidence in this case

substantially prejudiced her right to a fair trial, see Petition for Writ of Certiorari, pp. 5, 6, 12, 13, is incorrect. In this regard, it is an erroneous characterization of the record that "[t]he sole issue on appeal before the First Circuit was whether the admissibility of out of court settlement evidence was governed by Fed. R. of Evid. 408 or the law of Massachusetts."[2] See Petition for Writ of Certiorari, pp. 6-7. See also *id.*, p. 5. To the contrary, and in order to place this petition in a proper context, this Court should be aware that two alternative issues were extensively presented to the circuit court, and these two alternative issues remain potentially applicable if this Court were ultimately to grant the petitioner the relief requested in this case.

The first alternative issue previously raised before the circuit court was that, even if Fed. R. of Evid. 408 was applicable in this case, its provisions were not violated in the circumstances. Regarding this alternative issue, Celotex previously argued that Fed. R. of Evid. 408, by its own terms, permits the offer of settlement evidence for purposes other than proving the validity or invalidity of a claim. See Fed. R. of Evid. 408, sen. 4. Celotex argued that the settlement evidence in this case was properly offered for such "other purpose[s]" within the meaning of Fed. R. of Evid. 408, namely, for the purpose of mitigating potential damages. Celotex noted that, in general, there were a substantial number of federal cases construing Fed. R. of Evid. 408 in which settlement evidence was admitted under the rule and that, when admitted,

[2] The petitioner has apparently conceded in her petition, as she had done before the circuit court, that the admission of the pretrial settlement evidence in this case was proper — if Massachusetts law is considered applicable. See Petition for Writ of Certiorari, pp. 6-7, n.4; *Tritsch* v. *Boston Edison Co.*, 363 Mass. 179, 182, 293 N.E.2d 264, 267 (1973) ("In mitigation of damages, a defendant is entitled to show in evidence the amount of money paid or promised to the plaintiff by a joint tortfeasor on account of the same injury.").

deference was given to the sound discretion of the trial judge whose decision was not overturned absent a showing of abuse.[3]

The second alternative issue previously raised before the circuit court was that, even if the admission of the settlement evidence in this case was regarded as erroneous pursuant to Fed. R. of Evid. 408, the error was harmless and did not affect

---

[3] In its brief to the circuit court, Celotex identified the following cases in which the federal courts have admitted evidence of settlements pursuant to the "other purpose[s]" provisions of Fed. R. of Evid. 408. *Belton* v. *Fibreboard Corp.*, 724 F.2d 500, 504-505 (5th Cir. 1984) (evidence that other asbestos manufacturers had settled with plaintiff admissible to explain to jury why other defendants were not in court and to prevent confusion); *Breuer Electric Manufacturing Co.* v. *Toronado Systems of America, Inc.*, 687 F.2d 182, 185 (7th Cir. 1982) (evidence of settlement negotiations admissible in hearing to set aside default to show defendants' awareness of claim); *Central Soya Co., Inc.* v. *Epstein Fisheries, Inc.*, 676 F.2d 939, 944 (7th Cir. 1982) (evidence of settlement admissible to show partial forgiveness of primary debt in guaranty case); *In Re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106, 1124 (7th Cir. 1979), *cert. denied*, 444 U.S. 870 (1979) (evidence of negotiations admissible on issue of fairness of partial settlement in class action); *John McShain, Inc.* v. *Cessna Aircraft Co.*, 563 F.2d 632, 635 (3d Cir. 1977) (evidence of settlement admissible to show bias or prejudice of a witness); *B&B Investment Club* v. *Kleinert's, Inc.*, 472 F. Supp. 787, 791 (E.D. Pa. 1979) (evidence of settlement discussions admissible to show that negotiation of class action was not successful). See also *Cassino* v. *Reichhold Chemicals, Inc.*, 817 F.2d 1338, 1342 (9th Cir. 1987); *Bradbury* v. *Phillips Petroleum Co.*, 815 F.2d 1356, 1363-1364 (10th Cir. 1987); *Bituminous Const., Inc.* v. *Rucker Enterprises, Inc.*, 816 F.2d 965, 968-969 (4th Cir. 1987); *Crues* v. *KFC Corp.*, 768 F.2d 230, 233 (8th Cir. 1985); *Brocklesby* v. *United States*, 767 F.2d 1288, 1292-1293 (8th Cir. 1985); *In Re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238, 275 (3d Cir. 1983).

In addition, Celotex argued that, when the question of the admissibility of a prior settlement is raised pursuant to the provisions of Fed. R. of Evid. 408, this issue represents a matter "resting in the sound discretion of the trial court which should use its best judgment as to which procedure is more appropriate under the circumstances of the particular case." *Sharp* v. *Hall*, 482 F. Supp. 1, 2 (E.D. Okla. 1978). See also *Weir* v. *Federal Ins. Co.*, 811 F.2d 1387, 1396 (10th Cir. 1987) (decision to exclude or admit evidence regarding settlement, pursuant to Fed. R. Evid. 408, is within sound discretion of trial judge and will not be reversed by Court of Appeals absent clear abuse of discretion); *Kennon* v. *Slipstreamer, Inc.*, 794 F.2d 1067, 1069-1070 (5th Cir. 1986) (same).

the petitioner's substantial rights in the underlying circumstances.[4] In this regard, Celotex argued that the settlement evidence in this case was innocuously presented in the form of a single-sentence "stipulation" during the course of a week long trial, and no emphasis was placed on it. Ironically, if the jury misapplied the settlement evidence to liability issues, rather than to damages issues as they had been specifically instructed to do by the trial judge, this misapplication would have tended to undermine, rather than bolster, Celotex's predominant defense theories at trial. These defense theories were that the petitioner's decedent had not suffered an asbestos-related disease at all and, alternatively, that his health risks, if any, could not have been anticipated given the "state of the art" regarding medical knowledge of asbestos at the time of his alleged exposure. In addition, any purported error in the introduction of the settlement evidence at the trial would have been cured by the trial judge's clarifying instructions to the jury

---

[4] Celotex argued that, even if the admission of the settlement evidence was considered erroneous in this case, this finding alone would not warrant the award of a new trial. See Fed. R. of Evid. 103(a) (evidentiary ruling is not reversible error "unless a substantial right of the party is affected"); 28 U.S.C. § 2111 (appellate court should render judgment "without regard to errors or defects which do not affect the substantial rights of the parties"). As the First Circuit Court of Appeals properly recognized in a prior case, the applicable standard of review "for determining whether the admission of such evidence is harmless error is whether [the court] can say 'with fair assurance . . . that the judgment was not substantially swayed by the error . . .'" *Lataille* v. *Ponte*, 754 F.2d 33, 37 (1st Cir. 1985), quoting *Kotteakos* v. *United States*, 328 U.S. 750, 765, 66 S. Ct. 1239, 1248 (1946), *United States* v. *Pisari*, 636 F.2d 855, 859 (1st Cir. 1981). In this regard, "[t]he centrality of the evidence, its prejudicial effect, whether it is cumulative, the use of the evidence by counsel, and the closeness of the case are all factors which bear on this determination." *Lataille* v. *Ponte, supra* at 37, citing 1 J. Weinstein & M. Berger, *Weinstein's Evidence* § 103[06] at 103-61 to 103-63 (1982). See, by analogy, *Branch* v. *Fidelity & Casualty Co. of New York*, 783 F.2d 1289, 1294 (5th Cir. 1986) (error in admitting settlement evidence pursuant to Fed. R. of Evid. 408 was harmless in circumstances); *Triangle Mining Co., Inc.* v. *Stauffer Chemical Co.*, 753 F.2d 734, 743 (9th Cir. 1985) (same).

in this case about such evidence. Celotex also argued that the petitioner could not fairly complain on appeal that the trial judge's clarifying instructions were inadequate or that his use of a general verdict form was improper, because her counsel had failed to make such objections at the trial.

In view of the extensive presentation of these alternative issues to the circuit court in this case, it is presumptuous for the petitioner to speculate (see petition, pp. 5-6, 12, 13) that, if the circuit court had ruled that Fed. R. of Evid. 408 applied in this case, "the court would then have been compelled to conclude by its own precedent that the admission of the settlement evidence constituted prejudicial error which mandated a new trial." See Petition for Writ of Certiorari, p. 12. There is simply no indication in the reported decision that, if Fed. R. of Evid. 408 in actuality applied in this case, the circuit court otherwise considered the exceptions contained within Rule 408, sen. 4 to be inapplicable or that, in any event, the circuit court considered the settlement evidence to be substantially prejudicial. See *Carota* v. *Johns Manville Corp.*, 893 F.2d at 448-451.

Reasons Why Writ of Certiorari Should Be Denied.

THE FIRST CIRCUIT COURT OF APPEALS CORRECTLY FOLLOWED THE ESTABLISHED PRECEDENT OF THIS COURT IN DECIDING THIS CASE.

This petition raises a routine question, namely, the application of substantive state law in federal court cases based upon diversity jurisdiction. Contrary to the petitioner's allegations,

this petition does not raise any "first time" issues of significance nor has the circuit court's decision in this case "so far departed from the accepted and usual course of judicial proceedings . . ." as to warrant or require intervention by this Court. See Supreme Court Rule 17.1(a). See generally *Pennsylvania* v. *Bruder*, 109 S. Ct. 205, 208 (1988) (Stevens, J., dissenting).

The petition mischaracterizes the decision of the circuit court in this case. See *Carota* v. *Johns Manville Corp., supra* at 448-451. There is no support in the language of the reported decision for the petitioner's intimations that the circuit court ruled that the Federal Rules of Evidence in diversity cases generally, see Petition for Writ of Certiorari, p. 6, or that Fed. R. of Evid. 408 specifically, see *id.*, pp. 10-11, were "unconstitutional." To the contrary, the circuit court in this case merely, and quite narrowly ruled that, in diversity jurisdiction cases, the federal courts may appropriately apply the substantive law of the forum state, particularly where that law represents an important and well established state policy, even though the substantive state law may otherwise conflict with federal law. See *Carota* v. *Johns Manville Corp., supra* at 451.

The circuit court in *Carota* did not modify the time-honored tests for determining the application of federal and state law in diversity jurisdiction cases announced by this Court in *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938) and *Hanna* v. *Plumer*, 380 U.S. 460 (1965), as the petitioner alleges. See Petition for Writ of Certiorari, pp. 10, 13. In *Erie Railroad Co.*, this Court ruled that a federal court setting in a diversity case must apply state substantive law. *Erie Railroad Co.* v. *Tompkins, supra* at 78. More recently, this Court clarified that the intent of the *Erie Railroad Co.* decision "was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome

of a litigation, as it would be if tried in a State court." *Walker* v. *Armco Steel Corp.*, 446 U.S. 740, 746 (1980), quoting *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 109 (1945). See also *Hanna* v. *Plumer*, 380 U.S. at 468 (recognizing twin aims of *Erie* rule: discouragement of forum shopping and avoidance of inequitable administration of law). In this case, the circuit court expressly cited, and correctly applied, the principles set forth by this Court in the *Erie Railroad Co* and the *Hanna* cases. See *Carota* v. *Johns Manville Corp.*, 893 F.2d at 450-451.

The fact that the circuit court in *Carota* noted that the issue of pretrial settlement evidence may "not fall neatly into the substantive/procedural dichotomy," *id.* at 450, does not indicate, as the petitioner implies (see petition, p. 10), that the circuit court ultimately abandoned the "substantive/procedural" test adopted by this Court in *Erie Railroad Co.* and in *Hanna*. In the *Hanna* case itself, this Court recognized that "[t]he line between 'substance' and 'procedure' shifts as the legal context changes." *Hanna* v. *Plumer, supra* at 471.[5] The *Hanna* court concluded that many legal principles should be seen as "falling within the uncertain area between substance and procedure . . . rationally capable of classification as either." *Id.* at 472. In the specific context of Fed. R. of Evid. 408, moreover, leading commentators have recognized that "Rule 408 surely

[5] In this regard, the petitioner's reliance upon the *Flaminio, Fasanaro, Rioux*, and *Moe* cases, see Petition for Writ of Certiorari, pp. 9-10, is misplaced because each of these cases construe Fed. R. of Evid. 407, not Fed. R. of Evid. 408, and thus involve an inapposite "legal context," i.e., evidence of subsequent remedial measures. *Hanna* v. *Plumer, supra* at 471. See contrastingly *Flaminio* v. *Honda Motor Co.*, 733 F.2d 463, 470-472 (7th Cir. 1984) (construing Fed. R. of Evid. 407); *Fasanaro* v. *Mooney Aircraft Corp.*, 687 F. Supp. 482, 485 n.3 (N.D. Cal. 1988) (same); *Rioux* v. *Daniel Intern. Corp.*, 582 F. Supp. 620, 624-625 (D. Me. 1984) (same); *Moe* v. *Avions Marcel Dassault-Breguet Aviation*, 727 F.2d 917, 932-933 (10th Cir.), *cert. denied*, 469 U.S. 853 (1984) (classifying Fed. R. of Evid. 407 as substantive).

falls into that area in which the *Hanna* decision gave Congress an option to treat rules as either substantive or procedural." 23 C. Wright & K. Graham, *Federal Practice and Procedure: Evidence* § 5315 (1980). See also Note, "Rule 408 and *Erie*: The Latent Conflict," 12 Ga. L. Rev. 275, 293 (1977) (fact that issue may have some procedural aspect cannot alone provide excuse for disregard of state substantive law).[6] The circuit court in *Carota* simply recognized that Fed. R. of Evid. 408 represented an area of law which was not readily classified as being either purely substantive or purely procedural. See *Carota* v. *Johns Manville Corp.*, 893 F.2d at 450.

It is clear from the circuit court's decision in *Carota*, however, that the court ultimately concluded that the issue of the admissibility of settlement evidence was substantive in nature and that substantive Massachusetts law thus applied in this case:

> "[W]hen a state permits the admission of out of court settlement evidence with the intent that such admission affect the damage award, then we must deem the issue substantive. If a state has a substantive policy to have a jury hear out of court settlement evidence when determining damage awards, we will not contravene that state law in a diversity action."

Carota v. *Johns Manville Corp.*, *supra* at 451. In so ruling, the circuit court expressly relied upon and correctly applied the

---

[6] Even the petitioner at one point acknowledges that the issue of the admissibility of settlement evidence "was rationally capable of classification as either substantive or procedural." See Petition for Writ of Certiorari, p. 12. It may also be noted, as the circuit court observed, see *Carota* v. *Johns Manville Corp.*, *supra* at 450, that the petitioner had previously conceded that the underlying settlement issue is substantive in nature. In her main brief to the circuit court, the petitioner acknowledged that the settlement evidence issue relates to or arises out of "the parties' substantive right to a full recovery. . . ." See petitioner's main brief to circuit court, p. 20.

principles adopted by this Court in the *Erie Railroad Co.* case and its progeny.

Apart from the fact that the allegation is itself untrue, the petitioner's criticism that the circuit court employed an erroneous test in this case adapted from the case of *Ricciardi* v. *Children's Hosp. Medical Center*, 811 F.2d 18, 21 (1st Cir. 1987) is particularly unfair to the court and inequitable in the circumstances. See Petition for Writ of Certiorari, p. 10. Specifically, the petitioner faults the circuit court for purportedly applying a test other than that set forth in the *Erie Railroad Co.* and the *Hanna* cases. See Petition for Writ of Certiorari, p. 10 ("Instead, the court applied a different test: whether the federal rule 'impinge[d] on some substantive state policy embodied in the state rule.' "), quoting *Carota* v. *Johns Manville Corp., supra* at 450-451. In her main brief to the circuit court, however, the petitioner argued that this exact same language represented a standard applicable to her appeal. See petitioner's main brief to circuit court, p. 24 ("[T]he question is whether the federal rule, in this case, Rule 408, 'impinges on some substantive state policy embodied in the state rule.' *Id.* 811 F.2d at 21."). The petitioner should not be heard to complain that the circuit court employed particular language in its decision which it had been invited to consider in the first instance by the petitioner herself. As this Court declared in *Davis* v. *Wakelee*, 156 U.S. 680, 689 (1895), "[i]t may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position . . . ." See also *Patriot Cinemas, Inc.* v. *General Cinema Corp.*, 834 F.2d 208, 212 (1st Cir. 1987) (equity "precludes a party from asserting a position in one legal proceeding which is contrary to a position it has already asserted in another."); *Allen* v. *Zurich Ins. Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982) ("[A]

party may properly be precluded as a matter of law from adopting a legal position in conflict with one earlier taken in the same or related litigation."); *Jett* v. *Zink*, 474 F.2d 149, 154-155 (5th Cir. 1973) (party precluded from asserting position on appeal inconsistent from that taken in earlier appeal of same case); 1B *Moore's Federal Practice* ¶ 0.405[8] at 240 (1988 ed.) (judicial estoppel may operate "to preclude changes in position in successive stages of the same litigation . . ."). See analogously *Crenshaw* v. *Quarles Drilling Corp.*, 798 F.2d 1345, 1347 (10th Cir. 1986); *Richardson* v. *Turner*, 716 F.2d 1059, 1061 (4th Cir. 1983); *Alexander* v. *Town & Country Estates, Inc.*, 535 F.2d 1081, 1082 n.1 (8th Cir. 1976).

The circuit court in *Carota* appropriately deferred to Massachusetts substantive law in affirming the admissibility of the pretrial settlement evidence in this case. The Massachusetts Supreme Judicial Court has identified "the introduction of settlement agreements in evidence at trial" as "a longstanding principle." *Franklin* v. *Guralnick*, 394 Mass. 753, 755, 477 N.E.2d 405, 406 (1985). See *Boston Edison Co.* v. *Tritsch*, 370 Mass. 260, 266, 346 N.E.2d 901, 905 (1976); *Tritsch* v. *Boston Edison Co.*, 363 Mass. at 182, 293 N.E.2d at 267; *Wadsworth* v. *Boston Gas Co.*, 352 Mass. 86, 94, 223 N.E.2d 807, 813 (1967); *Daniels* v. *Celeste*, 303 Mass. 148, 152, 21 N.E.2d 1, 3 (1939); *O'Neil* v. *National Oil Co.*, 231 Mass. 20, 28-29, 120 N.E. 107, 110 (1918); *Holleman* v. *Gibbons*, 27 Mass. App. Ct. 563, 570, 541 N.E.2d 345, 349 (1989); *Muzichuk* v. *Liberty Mutual Ins. Co.*, 2 Mass. App. Ct. 266, 276, 311 N.E.2d 558, 563-564 (1974). In the *Franklin* case, the Massachusetts high court indicated that this evidence is considered so important that the jury's deliberations may be interrupted to inform them of a settlement negotiated by a co-defendant and the plaintiff during the course of jury deliberations. *Franklin* v. *Guralnick*, 394 Mass. at 755-756 and n.7, 477 N.E.2d at 406-407 and n.7.

The substantive policies underlying this longstanding state rule are not limited merely to preventing a "double recovery" by plaintiffs as the petitioner alleges. See Petition for Writ of Certiorari, pp. 10-11. This rationale could easily be satisfied by having the court clerk perform the mathematical calculation of subtracting a settlement sum from the jury's verdict, a readily apparent point which could not have escaped the attention of the Massachusetts appellate courts over the many years.[7] Rather, the substantive policies underlying the Massachusetts rule regarding the admissibility of settlement evidence also concern questions of the mitigation of damages and the recovery of interest on judgments in which settlement monies have been previously received. These additional rationales reflect the fact that the application of interest monies to the jury's verdict prior to the subtraction of a settlement sum can drastically alter the amount of damages payable by non-settling defendants and thus substantially affect the parties' total damages obligations. See *Boston Edison Co.* v. *Tritsch*, 370 Mass. at 266 and n.10, 346 N.E.2d at 905 and n.10 (recognizing that "the specifics of the accounting in a case like the present where there has been substantial delay in the actual recovery [may be significant], and interest factors are of practical importance.").[8]

---

[7] In Massachusetts practice, contrary to the petitioner's assertions otherwise (see Petition for Writ of Certiorari, p. 11), the clerks of courts, and not the jury, routinely perform the actual deduction calculations for settlements received from joint tortfeasors. See, e.g., *Boston Edison Co.* v. *Tritsch*, 370 Mass. at 266, 346 N.E.2d at 905.

[8] The substantive policies underlying the Massachusetts rule regarding settlement evidence are thus more involved than those underlying the rule in Mississippi construed in *McHann* v. *Firestone Tire & Rubber Co.*, 713 F.2d 161, 166 (5th Cir. 1983), a case upon which the petitioner has heavily relied. See Petition for Writ of Certiorari, pp. 10, 12. Regardless, this Court has noted that, "[a]s to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari." *Ruhlin* v. *New York Life Ins. Co.*, 304 U.S. 202, 206 (1938).

As the circuit court in this case correctly noted, "the decision to grant juries the opportunity to hear settlement evidence reflects a view of that evidence as substantive, because the juries' hearing of this evidence affects the substantive rights of plaintiffs to damages." *Carota* v. *Johns Manville Corp.*, *supra* at 451. The circuit court properly recognized that damages are an element of the plaintiff's case and that the law of damages is substantive. *Id.* at 451. In diversity jurisdiction cases, the federal courts regularly look to state law to ascertain the elements and application of allowable damages. See, e.g., *O'Gilvie* v. *International Playtex, Inc.*, 821 F.2d 1438, 1448 (10th Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988) (application of punitive damages in diversity case governed by state law); *Woodling* v. *Garrett Corp.*, 813 F.2d 543, 557 (2d Cir. 1987) (income taxes and prejudgment interest governed by state law); *United States* v. *City of Twin Falls, Idaho*, 806 F.2d 862, 879 (9th Cir. 1986), *cert. denied*, 482 U.S. 914 (1987) (attorney's fees governed by state law); *Affiliated Capital Corp.* v. *City of Houston*, 793 F.2d 706, 709 (5th Cir. 1986) (item of accrued interest); *Losey* v. *North American Philips Consumer Electronics Corp.*, 792 F.2d 58, 62 (6th Cir. 1986) (tax consequences of damages award); *Hill* v. *Bache Halsey Stuart Shields, Inc.*, 790 F.2d 817, 827 (10th Cir. 1986) (punitive damages); *Smith* v. *Industrial Constructors, Inc.*, 783 F.2d 1249, 1254 (5th Cir. 1986) (income tax); *Aubin* v. *Fudala*, 782 F.2d 287, 289 (1st Cir. 1986) (prejudgment interest); *Willey* v. *Minnesota Mining & Manufacturing Co.*, 755 F.2d 315, 321 (3d Cir. 1985) (loss of earnings).

In the present case, the circuit court correctly recognized that the policies underlying the Massachusetts rule, which permit the jury to hear pretrial settlement evidence, are so closely linked with the substantive measure of damages, that federal courts sitting in diversity must apply the state rule and allow the admission of settlement evidence. The circuit court's deci-

sion was, in all respects, consistent with the established precedent of this Court and should not be disturbed.

Conclusion.

The petition for writ of certiorari should be denied.

Respectfully submitted,

THOMAS P. O'REILLY,
JANET L. MALOOF,
Trial Counsel,

RICHARD L. NEUMEIER,
LEONARD F. ZANDROW, JR.,*
B. DEIDRE BRENNAN,
Appellate Counsel,

PARKER, COULTER, DALEY & WHITE,
One Beacon Street,
Boston, Massachusetts 02108.
(617) 723-4500

**Counsel of Record*